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No. 82-352

In The

Supreme Court of the United States

October Term, 1982

PUEBLO AIRCRAFT SERVICE, INC.,
Petitioner,

vs.

THE CITY OF PUEBLO, COLORADO, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Facts

The findings of fact determined by the trial court and affirmed by the Tenth Circuit and upon which the trial court concluded that each of Petitioner's antitrust claims was without substance and upon which the trial court found no specific facts existed showing that there is a genuine issue for trial, are set forth in substantial detail in *Pueblo Aircraft Service, Inc. v. City of Pueblo, Colorado,* 498 F. Supp. 1205 (1980) and 679 F. 2d 805 (1982) at 806-807.

In 1948 City acquired from the federal government by deed a tract of land which had been used as a military airfield during World War II, granted for the specific purpose of establishing a municipal airport. At the time of acquisition, there were certain facilities available to City on the premises for airport operations including hangars and a storage facility to store aviation fuel. Since prior to 1970, City granted leases to three "fixed base operators" who operated businesses upon specific portions of the airport lands so leased and performed specific services which were monitored by City, including refueling of aircraft, sale of new and used aircraft, repair and maintenance of aircraft, sale of aircraft parts and supplies, rental and charter of aircraft, conduct of a flying school, operation of food vending machines, storage of aircraft, and the manufacture of aircraft parts and components. The lease agreements with each of the "fixed base operators" required them to purchase all aviation fuel from City for resale. The three fixed base operators were defendants Pan-Ark, Flower Aviation and the plaintiff-petitioner, Pueblo Aircraft.

In 1970, Willard J. Teel and Betty I. Teel acquired all of the stock of Pueblo Aircraft and thereafter actively managed a fixed base operation under the lease granted by City, which was entered into in 1967 and extended in 1972 for an additional five years under an option contained in the original lease and expired on March 31, 1977, but was extended to June 31, 1977.

Several months prior to the expiration of Pueblo Aircraft's lease, City determined to require public bidding for the lease, upon its termination, of the premises and im-

provements leased to Pueblo Aircraft. The City on March 14, 1977 adopted a Resolution stating that the City was committed to compliance with Title VI of the Civil Rights Act and made all leases for use of airport facilities and property subject to solicitation of bids including notification of the Colorado Economic Development Association, an affiliate office of the Office of Minority Business Enterprises. The only bidders were Pueblo Aircraft and Pan-Ark. Pueblo Aircraft's bid contained exclusions to the proposals for bids and Pan-Ark's bid contained no exclusions. Pan-Ark was declared the successful bidder and City authorized a lease of the premises formerly occupied by Pueblo Aircraft to Pan-Ark commencing July 1, 1977.

City, at all times following acquisition of the airport, assumed control and responsibility for providing and maintaining the storage facility, monitoring the quality of fuel, providing fire protection and assuring the supply of aviation fuel to serve the needs of the fixed base operators and other aircraft using the airport who were not supplied by the fixed base operators. All leases entered into between City and the fixed base operators required the operators-lessees to purchase all aviation gasoline or propellants dispensed by them from City. The storage facility was on the premises when the property was acquired by the City. It was an underground fuel storage facility located away from the buildings and ramp area, and City daily monitored the fuel in order to assure its quality before it was dispensed to the fixed base operators. The City purchased the fuel through competitive bidding. At no time did any fixed base operator offer to construct its own storage facility on the airport premises so as to obtain aviation fuel independent of City.

All three fixed base operators were authorized by their respective leases to engage in all of the same activities including fueling and lubrication, maintenance and repair of aircraft and giving student flying instructions.

Course of Proceedings

The trial court granted Respondents' motion for summary judgment on all Petitioner's antitrust claims "based upon extensive pleadings, voluminous depositions, documents, affidavits filed in support of and in opposition to the motions, brief of the respective parties, and an open court hearing." *See Pueblo Aircraft Service, Inc. v. City of Pueblo, Colorado*, 679 F. 2d 805, 806.

The Tenth Circuit affirmed the granting of summary judgment on grounds of state action immunity, that no genuine issue of material fact existed, and that each antitrust claim was without substance. Both the trial court in entering a summary judgment and the Tenth Circuit in affirming the granting of summary judgment were aware of and took into consideration the Supreme Court's general rule that summary procedures should be used sparingly in antitrust litigation. *See Id.*, at 806.

REASONS FOR DENYING WRIT

I.

The entry of summary judgment based upon the factual record disposes of the instant case.

The trial court considered the motions for summary judgment separately as to each of Petitioner's antitrust

claims. After such specific consideration and factual analysis he determined no alleged conspiracy, monopoly, or antitrust violation existed. *See Pueblo Aircraft Service, Inc. v. City of Pueblo, Colorado,* 498 F. Supp. 1205. His review of the entire record before him revealed no facts which directly or by inference support the Petitioner's allegation that Respondents entered into a conspiracy to eliminate Petitioner as a competitor in the major services provided at the airport by fixed base operators or support the allegation that the overt acts set forth in the complaint were done in furtherance of such a conspiracy. *See Id.,* at 1213. The trial court further found that the granting of the lease to Pan-Ark did not create a monopoly in the services of repair and maintenance of aircraft and student flying instruction as alleged by Petitioner. *See Id.,* at 1216.

Even if the Supreme Court granted certiorari to review only the state action antitrust immunity question presented for review and reversed the Tenth Circuit on such question, the decision of the Tenth Circuit in the instant case would remain final and in effect. Neither the trial court's entry of summary judgment nor the Tenth Circuit affirmance thereof on the factual record conflicts with any decision of another court of appeals or of the Supreme Court.

Previous decisions of the Supreme Court on the question of state action antitrust immunity did not involve cases wherein the trial court found on the factual record that no antitrust laws had been violated. *See Community Communications Co. v. City of Boulder,* 102 S. Ct. 835 (1982), *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.,* 445 U. S. 97, *City of Lafayette v.*

Louisiana Power & Light Co., 435 U. S. 389, *New Motor Vehicle of California v. Orrin W. Fox Co.*, 439 U. S. 96, *Bates v. State Bar of Arizona*, 433 U. S. 350, *Cantor v. Detroit Edison Co.*, 428 U. S. 579.

II.

The Tenth Circuit's decision in the instant case acknowledged and followed decisions and underlying policy of the Supreme Court on state action immunity.

The Tenth Circuit did accept and follow the state action immunity standards and underlying policy set forth by the Supreme Court in *Community Communications Co. v. City of Boulder*, 102 S. Ct. 835 (1982), as explained and adopted in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389 (1978).

City of Lafayette does not necessarily require a municipality "to point to a specific, detailed legislative authorization before it properly may assert a Parker defense to an antitrust suit." The Supreme Court agreed with the Court of Appeals in *City of Lafayette* and concluded "that an adequate state mandate for anticompetitive activity of cities and other subordinate governmental units exists when it is found from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." 435 U. S. at 415.

The Tenth Circuit examined and interpreted the language of Colorado Revised Statutes, 1973, § 41-4-101 and 201 *et seq.* *See Appendix A, Brief of Amici Curiae* and

determined the State of Colorado by affirmative legislative action granted municipalities an exemption from operation of federal antitrust laws. *See Pueblo Aircraft Service, Inc. v. City of Pueblo, Colorado,* 679 F. 2d at 809. The Tenth Circuit also cited with approval the Colorado Supreme Court decision in *Rocky Mountain Motor Co. v. Airport Transit Co.,* 124 Colo. 147, 235 P. 2d 580, wherein the Court referred to those airports operated by municipalities under the authority of the Statute as airports operated as a ". . . governmental function assigned to it to enforce the general policy of the state in the administration of general laws." 238 P. 2d at p. 586.

Both the Tenth Circuit and the Colorado Supreme Court in interpreting the Statute in question determined operation of airports by municipalities to be the policy of the state and when a municipality operates an airport under the Statute it acts as an instrumentality of the state in performance of a state function.

That Statute empowers municipalities to operate and manage airports and specifically grants to such municipalities jurisdiction and power to regulate the use of such airports, to enact and require fees, charges and tolls, to provide rules and regulations covering the use of such airports and facilities and the use of other property or means of transportation within or over such airports, and to lease or assign space or area necessary or useful in connection therewith. *See Appendix A, Amici Curiae Brief.*

Based upon the language of the Statute and the authority given municipalities to operate airports thereunder, the Colorado legislature certainly "contemplated the kind of

action complained of" by Petitioner. *See City of Lafayette,* 435 U. S. at 415.

The legislature by such Statute did "sanction anti-competitive municipal activities and thereby immunize municipalities from antitrust liability." *See City of Boulder,* 102 S. Ct. at 840.

The language of the Statute and interpretation given it by the Tenth Circuit and Colorado Supreme Court constitutes a "clearly articulated and affirmatively expressed state policy to displace competition with regulation or monopoly public service" through the instrumentalities of municipalities at municipally operated airports. *See City of Lafayette,* 435 U. S. at 414, *City of Boulder,* 102 S. Ct. at 840.

The Statement of the Tenth Circuit in the instant case that under the Statute in question the operation of airports by municipalities are "public, governmental functions" was not meant by the Tenth Circuit to be the basis of state action immunity as discussed by Chief Justice Burger in his concurring opinion in *City of Lafayette.* The Tenth Circuit by such language merely emphasized that the City of Pueblo was acting in its governmental capacity "as an arm of the state for the public good on behalf of the state rather than iteslf." 679 F. 2d at 810. Such statement represents a prior logical determination before the Court could reasonably conclude the City was acting in furtherance of state policy. For if the City acted solely on its own behalf "for purely parochial interests", it could not have acted as an agent or instrumentality of the state.

Neither the *City of Lafayette* nor its progeny mandate statutory language directing each specific anticom-

petitive activity complained of. To argue that such a mandate must exist before state action immunity applies, would, for all practical purposes, nullify the rationale of the *City of Lafayette* and thwart the acknowledged function of "municipalities as instrumentalities of the state for the convenient administration of government within their limits." *See City of Lafayette,* 435 U. S. at 413.

Few legislative acts empowering municipalities to perform activities in furtherance of state policy are couched in antitrust language. Antitrust laws in all their complex procedural, factual and substantive aspects should not decide how municipalities are to exercise zoning, licensing, or other police powers. Virtually all municipal regulations and the performance of ordinary, convenient, and reasonable municipal activities have some anticompetitive effect, even if slight.

In order for municipalities to maintain their historic purpose and to continue to exist as separate but integral parts of government available to perform delegated activities as instrumentalities of the state and to function reasonably as local government entities, *City of Lafayette* should not be expansively applied.

CONCLUSION

The Tenth Circuit's decision in the instant case neither limits, expands or conflicts with the Supreme Court's prior decisions and announced policy on state action immunity. The Tenth Circuit properly applied the law and facts in

affirming the trial court's entry of summary judgment against Petitioner. The Tenth Circuit decision as written should be allowed to stand and the petition for certiorari should be denied.

Respectfully submitted,

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